85-1462

NO.....

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

October Term, 1985

ROD WALLACE,

Petitioner,

against

JOHN WYNNE HERRON, JOHN N. GULICK, JR., LAW OFFICES OF JOHN WYNNE HERRON, A PROFESSIONAL CORPORATION, AND DARYL J. MCKINSTRY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Whether an Indiana court may, consistent with due process, assert *in personam* jurisdiction pursuant to Indiana's "Long-Arm" statute over non-resident defendants alleged to have committed the intentional tort of malicious prosecution against an Indiana resident, or in the alternative,

Whether attorneys alleged to have committed the intentional tort of malicious prosecution are to be accorded greater protection under a due process analysis of personal jurisdiction than that accorded other non-resident defendants alleged to have committed intentional torts.

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Opinions Below

The United States District Court for the Southern District of Indiana issued its order of dismissal on January 9, 1985. That order and memorandum opinion are unreported and are set out in the appendix to this Petition (the "Appendix") beginning at A-11.

The United States Court of Appeals for the Seventh Circuit affirmed the District Court's dismissal on December 5, 1985. That opinion is reported at 778 F.2d 391 (7th Cir. 1985), and the opinion and Order are set out in the Appendix at A-1 et seq.

Jurisdiction

The decisions sought to be reviewed are the District Court's order of dismissal dated and entered January 9, 1985 and the affirmance of that dismissal by the United States Court of Appeals for the Seventh Circuit as decided December 5, 1985.

The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 2101(c) and Rule 19 of the Rules of this Court.

Constitutional Provisions and Statutes Involved

This case involves the due process clause of the Fourteenth Amendment to the Constitution of the United States and the provisions of Indiana's "Long-Arm" Statute, Indiana Code, Title 34, Trial Rule 4.4. The relevant texts of the foregoing are set forth in the Appendix at A-22 et seq.

Statement of the Case

Petitioner Rod Wallace is an Indiana resident who has been an independent dealer for several companies dealing in log home products since the late 1960's. From 1974 to 1976 Donna and Willis Seeley (the "Seeleys") were residents of Indiana and neighbors of Wallace, and at sometime prior to April 26, 1975, the Seeleys discussed with Rod

Wallace their interest in obtaining a franchise similar to Wallace's.

In 1975, the Seeleys signed a franchise dealership agreement with Real Log Homes, Inc. ("Real"), giving the Seeleys a territory covering several counties in northern California. Wallace was not a party to this agreement and played no role in the negotiations between the Seeleys and Real. Wallace was not then, and has never been, an agent or officer of Real.

In May of 1976, more than a year after signing their agreement with Real, the Seeleys moved from Indiana to California, apparently to begin marketing log homes in their franchise territory. The Seeleys later alleged that problems resulted from their business relationship with Real, and on February 16, 1978, after consultation

with John N. Gulick and John Wynne Herron of the Law Offices of John Wynne Herron ("Herron"), a Professional Corporation, the Seeleys filed a lawsuit in California against Real. On March 1, 1978, an amended complaint was filed in the California lawsuit adding Wallace as a defendant. Service of process upon Wallace was accomplished pursuant to the California "Long-Arm" Statute through the Office of the Sheriff of Brown County, Indiana in March of 1978. In January of 1979 attorney Daryl J. McKinstry ("McKinstry") appeared on behalf of the Seeleys, and McKinstry assumed supervision of the case when Herron withdrew as counsel of record on May 25, 1979.

The claims against Rod Wallace were contained in three of the several counts included in the Seeleys' initial

complaint. The first such count alleged that Wallace was an agent of Real and that Real was not properly registered with the California Corporations Commissioner in violation of California franchise investment law. The second such count erroneously alleged that Wallace was an agent of Real, that Wallace had made certain representations in Indiana concerning the products of Real, and that Wallace participated in a conspiracy to commit fraud. The third count against Wallace was again premised on the erroneous theory that Wallace was an agent of Real and alleged negligent misrepresentation. The allegations of all three counts were without probable cause.

The Seeleys' lawsuit in California sought $1,000,000 in compensatory damages and $5,000,000 in punitive

damages. When named as a defendant, Wallace was an Indiana resident, had never visited the State of California, had no contacts with the State of California, and prior to the Seeleys' announcement that they had negotiated a California franchise with Real, had no reason to believe that his earlier casual conversations with the Seeleys would lead them to California.

Wallace moved to quash service of process in the California court, arguing that he had had no contacts with the Seeleys after they left Indiana, that he had never been within the State of California, that he had no way to anticipate that the Seeleys would respond to his conversations with them by independently contracting with Real to undertake a franchise in California, and that the allegations of the Seeley

lawsuit were without probable cause. Notwithstanding Wallace's lack of involvement in the Seeleys' agreement with Real and his lack of knowledge with respect to the location of the Seeleys' franchise, Seeleys' attorneys successfully argued to the California court that Wallace had committed acts within the State of Indiana which he could reasonably have expected to have effects in California.

Over the course of the following five years, the attorney-defendants required Wallace to respond to five amended complaints, required him to respond to discovery by interrogatories and requests for production, deposed him in Indiana, and when they were dissatisfied with their own inability to substantiate their allegations, required Wallace to respond to motions to compel

further discovery. Throughout those five years, Wallace continued to defend on the basis that the Seeleys' claims were without any probable cause and refused all settlement demands. Finally, on April 23, 1983, without any agreements, settlement or release, Wallace was voluntarily dismissed with prejudice from the California lawsuit.

On March 27, 1984, Wallace brought an action for malicious prosecution in the Brown County Circuit Court in Indiana, naming the Seeleys as defendants. As a California resident, on her own behalf and as administratrix of her late husband's estate, Donna Seeley moved to dismiss for lack of personal jurisdiction. The State Court concluded that the alleged malicious prosecution of the California lawsuit against Wallace constituted sufficient minimum

contacts between the Seeleys and the State of Indiana, so that it would not violate due process for an Indiana court to exercise personal jurisdiction over them.

The Seeleys' attorneys were later added to Wallace's lawsuit by an amended complaint, and they removed the case to the United States District Court for the Southern District of Indiana and filed motions to dismiss for lack of personal jurisdiction. Wallace and Donna Seeley stipulated to a dismissal of Wallace's claims against the Seeleys, and the District Court subsequently granted the remaining defendants' motions for dismissal.

The Rulings Below

The United States District Court for the Southern District of Indiana ruled that it lacked personal jurisdiction over the California attorney-defendants and granted the defendants' motions to dismiss on January 9, 1985. Appendix A-11 et seq. The United States Court of Appeals for the Seventh Circuit heard oral argument on September 24, 1985 and on December 5, 1985, decided that the due process clause of the Fourteenth Amendment to the United States Constitution prevented the Indiana District Court from exercising in personam jurisdiction over the California defendants. The District Court's decision to dismiss Wallace's cause of action against the attorney-defendants for lack of in personam

jurisdiction was therefore affirmed. 778 F.2d at 396. Appendix A-1 et seq.

Reasons For Granting The Writ

This case concerns the right of a citizen to invoke the jurisdiction of the courts of his own state over a non-resident intentional tortfeasor where the alleged tortfeasor has reason to know his conduct will have an adverse effect on the plaintiff in the plaintiff's own state. In affirming the District Court's dismissal, the Seventh Circuit Court of Appeals has decided an important question of federal law in conflict with the decisions of this Court in Calder v. Jones, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984) and Burger King v. Rudzewicz, _____ U.S. _____, 105 S. Ct. 2174 (1985).

In addition, the Court of Appeals has rendered a decision in conflict with

the decisions of other Federal courts on the same question. Burt v. Board of Regents of University of Nebraska, 757 F.2d 242 (10th Cir. 1985) (reversing jurisdictional dismissal of lawsuit against non-resident defendants alleged to have committed various intentional torts); Blue Ridge Bank v. Veribanc, Inc., 755 F.2d 371 (4th Cir. 1985) (reversing jurisdictional dismissal of suit over non-resident defendants alleged to have defamed a bank); Army Times Publishing Company v. Watts, 730 F.2d 1398 (11th Cir. 1984) (affirming personal jurisdiction over nonresident defendant alleged to have committed libel). See also, Thompson v. Chrysler Motors Corporation, 755 F.2d 1162 (5th Cir. 1985) (reversing dismissal for lack of jurisdiction over non-resident defendants for lack of jurisdiction in

wrongful death and personal injury claim where the plaintiff's State was found to have a substantial interest in providing a forum for its residents); Cubbage v. Merchent, 744 F.2d 665 (9th Cir. 1984) (reversing dismissal where specific in personam jurisdiction over non-resident doctor defendants was supported by the purposeful invocation of the laws of the plaintiff's state); Donovan v. Grim Hotel Company, 747 F.2d 966 (5th Cir. 1984) (affirming in personam jurisdiction over a non-resident alleged to have violated wage and hour standards).

In Calder, this Court ruled that a California court could exercise jurisdiction over non-resident defendants because of the effects of the defendants' Florida conduct in the State of California. 104 S. Ct. at 1487. This Court concluded that because the

defendants allegedly committed an intentional tort, knowing it would have a potentially devastating impact upon the plaintiff and knowing that the plaintiff would be primarily injured in the state in which she lived and worked, the defendants "must 'reasonably anticipate being haled into court [in California] . . .'" Id. As in Calder, the defendants in this case were primary participants in a wrongdoing intentionally directed at the resident of another state, and consistent with the ruling of the Brown County Circuit Court of the State of Indiana, in personam specific jurisdiction ought to have been exercised by the federal District Court of Indiana.

In Calder, this Court approved the "effects test," recognizing that Jones' injury and her cause of action indisput-

ably arose out of the defendants' out-of-state conduct. That conduct, through its effect on Jones in the forum state, constituted sufficient contact with the forum to submit the defendants to its jurisdiction. As Justice Renquist, speaking for a unanimous Court, stated:

> [T]he plaintiff is the focus of the activities of the defendant out of which the suit arises . . . California is the focal point . . . of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the effects of their Florida conduct in California.

Calder v. Jones, 104 S. Ct. at _____, 79 L. Ed. 2d at 812.

In ruling that an Indiana court has no jurisdiction over non-resident intentional tortfeasors, the courts below have failed to focus on the effect of the defendants' conduct on the plaintiff and have applied a due process

criteria for in personam jurisdiction more appropriate to a determination of general jurisdiction than specific jurisdiction. Wallace asserts that specific jurisdiction arises solely out of his malicious prosecution by the Seeleys' attorneys. The conduct of those defendants took place largely in California, but targeted Wallace as an Indiana resident. Further, their conduct was calculated to have an effect on Wallace in Indiana more surely than the conduct of the defendants in Calder was calculated to have an effect on their target in California.

Although the defendants in this case availed themselves of the rationale of the "effects test" on a far more attenuated basis to acquire personal jurisdiction over Wallace pursuant to the California Long Arm Statute, they

now deny that their malicious prosecution of Wallace was sufficient to cause them to reasonably anticipate being haled into court in Indiana once the baseless nature of their lawsuit was revealed. Since the Indiana Long Arm Statute has been interpreted as extending personal jurisdiction of Indiana, including Federal Courts, to the limits permitted under the due process clause of the Fourteenth Amendment, Oddi v. Mariner-Denver, Inc., 461 F. Supp. 306, 308 (S.D. Ind. 1978), Indiana jurisdiction, like California jurisdiction, "collapses into a single search for the outer limits of what due process permits." Id. See also, Nu-Way Systems of Indianapolis, Inc. v. Belmont Marketing, Inc., 635 F.2d 617, 619 (7th Cir. 1980).

In denying Seeleys' motion for dismissal, the Brown Circuit Court ruled that the Seeleys' intentional conduct in California was calculated to cause injury in Indiana and that such conduct, standing alone, was sufficient to submit the Seeleys to the personal jurisdiction of the Indiana court. Although the malicious prosecution did involve numerous contacts with Indiana on the part of the Seeleys' attorneys, the Brown Circuit Court did not rely on conduct within Indiana or physical presence or contact with Indiana, but instead approved the same "effects test" applied by the attorney-defendants to subject Rod Wallace to jurisdiction in the courts of California. See also, Gaus v. County of Wells, Ind., 620 F. Supp. 1462 (N.D. Ind. 1985) (citing the Calder "effects test" with approval

in dicta, but dismissing because the non-resident plaintiff lacked sufficient contacts with Indiana).

The real issue in this appeal is whether the "effects test" for determining the existence of specific jurisdiction, as opposed to general jurisdiction, applies equally well to the malicious prosecution of Mr. Wallace by the attorney-defendants as to the intentional torts by non-attorneys at issue in Calder. The defendants must acknowledge that they conducted the malicious prosecution which is the subject of this litigation with the full knowledge and intent that their actions would have an effect upon an Indiana resident. The suggestion that the direct infliction of harm upon an Indiana resident in the form of malicious prosecution provides a lesser

basis for jurisdiction than a claim of indirect harm through the publication of slanderous materials defies logic and contradicts the plain language of the Calder decision.

Whereas in Calder, one might argue that the individual defendants might have intended no personal harm to the plaintiff despite the slanderous nature of their writings, there can be little doubt that the Seeleys' attorneys intended to directly effect Rod Wallace by naming him as an additional defendant in their amended complaint and in pursuing their cause of action long after it was revealed to have been baseless. Rod Wallace was as much the victim of an intentional tort as if he were a man struck by a stone thrown across a state line or the recipient of a letter bomb.

Surely the Court of Appeals would not rule that stone throwers and the letter bombers should not reasonably foresee being haled into court in the jurisdiction of their targeted victims. By the same token, attorneys who pursue a deliberate, malicious, intentional course of conduct, for the purpose of inflicting harm upon the resident of another state, and who continue to pursue the infliction of that harm for a number of years using the courts and legal mechanisms of the victim's own state to accomplish that wrongful goal, ought to expect to be required to answer for those wrongs in courts of the victim's own state.

The Attorney-Defendants' Minimum Contacts in Indiana

Seeleys' attorneys clearly availed themselves of the benefit of Indiana's legal process in obtaining service of the California complaint upon Wallace through the Brown County Sheriff's Office. They also relied upon Indiana law to compel discovery through the enforcement in Indiana of the California court's discovery orders. They came to Indiana and used Indiana Court Reporters to depose both Rod Wallace and Charles Chandler, another Indiana resident. Perhaps most important, however, was the implicit reliance of the defendants upon Indiana law to accord "full faith and credit" to any judgment they might have hoped to obtain against Wallace in California. Although all of those "minimum contacts" would be even more relevant to a determination of general

jurisdiction, they nevertheless ought to have compelled the federal courts to determine that the exercise of specific jurisdiction over these attorney-defendants would not offend traditional notions of fair play and substantial justice, and is therefore proper. International Shoe Co. v. Washington, 326 U.S. 310 (1945).

What does offend traditional notions of fair play and substantial justice is the apparent posture of the judiciary that justice is served by directing the victim of a malicious prosecution to once again involve himself in litigation in the tortfeasors' own state as the only proper forum in which his rights may be vindicated. The notion that Wallace's remedy for the damaging effects of five years of California litigation is to sue

the tortfeasors in California, despite the clear effects of their wrongdoing in Indiana and despite the fact that Wallace was the calculated target of the attorney-defendants' wrongdoing, defies common sense. If the effect of the tortfeasors' conduct on the plaintiff is to be the focus of due process analysis, we must wonder, with Mr. Wallace, how it can be that traditional notions of fair play and substantial justice require him to look to California to redress the damages done to him in Indiana by these California attorneys.

The Interests of the State of Indiana

Not only does Rod Wallace have a personal interest in his cause of action against these attorneys, but the State of Indiana has an interest in protecting its own citizens from nonresident intentional tortfeasors -- whether or

not they ever personally set foot in Indiana. Intentional torts need not be directed at the citizenry as a whole to give rise a state interest, but may merely be directed to the single victim of their wrongful conduct. Whether that victim be a Shirley Jones or a Rod Wallace, the state will rightfully have an interest in protecting its citizens. See, Blue Ridge Bank, 755 F.2d at 374 (citing Calder as recognizing the state's interest in protecting local victims of out-of-state conduct). See also, Army Times, 730 F.2d at 1401 (finding a state has "a significant interest in vindicating the rights of its citizens . . ..").

That the Courts of Indiana will exercise in personam jurisdiction in that regard was amply demonstrated in this very case when the state court

denied the jurisdictional challenge of the Seeleys. If non-resident defendants fear local prejudice, their recourse is to remove to Federal court, as did these defendants.

The Application of the Effects Test to Attorneys

In upholding the dismissal of Rod Wallace's claim, the Court of Appeals has essentially ruled that malicious prosecution by attorneys is to be distinguished from other intentional torts because attorneys ought not foresee being haled into foreign courts -- despite including improper parties-defendant to their lawsuits without probable cause and despite knowing that their conduct is calculated to impact on an innocent victim in a distant forum. Calder establishes a rule of law which speaks directly to the intentional tortfeasor. Calder stands for the

proposition that persons in any state who commit intentional torts which are targeted against victims in other states, or calculated to cause injury in other states, must reasonably foresee being haled into court where they have inflicted their harm, there to answer for their wrongdoing against the citizens of that state. Again, if they fear local prejudice, non-resident defendants may remove to Federal court as did these attorney-defendants.

Inexplicably the Court of Appeals distinguishes the circumstances at bar from those in Calder and Burger King Corp. v. Rudzewicz. The Court of Appeals correctly observes "The so-called 'effects' test is merely another way of assessing the defendants relevant contacts with the forum state," 778 F.2d at 395, but then attempts to distinguish

Calder by stating "The 'effects' of the intentional tort of libel in the forum state (i.e., the plaintiff's residence) are perhaps more pronounced than the 'effects' of most other intentional torts." Id. Wallace's response is that the "effects" of the California malicious prosecution on his personal and economic well being were as significant and substantial to him as might have been libel to Shirley Jones. More importantly, Wallace was more clearly the victim of conduct which was calculated to have an effect on a nonresident than would have been the case had he been the victim of a libelous newspaper article prepared by a California writer and published in Indiana. In short, like the letter bomb, the summons and complaint initiating a malicious

prosecution is calculated to have an adverse effect on its targeted victim.

The attorney-defendants' contacts with Indiana were clearly not "random," "fortuitous," or "attenuated". Burger King, 105 S. Ct. at 2183. These attorney-defendants brought suit against Wallace relying primarily on what they alleged was Wallace's conduct in Indiana, used Indiana process to cause him to be served with a summons and complaint in Indiana, caused him to respond to discovery and motions to compel in Indiana, took his deposition in Indiana, and intentionally caused the injury of which Wallace now complains. If those contacts are not sufficient to cause an attorney to reasonably anticipate being haled into court in the victim's forum, then attorneys would appear to be exempt from not only the

"effects test", but even from pre-Calder due process analysis.

Conclusion

In affirming the District Court's order of dismissal, the Court of Appeals for the Seventh Circuit has decided an important question of Federal law in conflict with the decision of this Court in Calder and in conflict with the decisions of other Federal Courts of Appeals on the scope of in personam jurisdiction over non-resident intentional tortfeasors. Further, the Court of Appeals decision erroneously suggests that attorneys are to be accorded greater due process protection than other intentional tortfeasors and that the damaging effects of malicious prosecution are somehow less deleterious than the effects of libel.

In the case on appeal the attorney-defendants availed themselves of the benefit of Indiana law and committed misconduct in California which was calculated to have an adverse effect on its targeted victim, Rod Wallace, in Indiana. Their contacts with Indiana were clearly not random, fortuitous, or attenuated, and were sufficient to cause the attorneys to reasonably anticipate being haled into court in Indiana once their California allegations had been proven to be without probable cause.

For all of the reasons set out above, and in the interest of justice and equity, a review on Writ of Certoriari should be granted so that this matter might be fully briefed,

argued, deliberated, and decided by the United States Supreme Court.

Respectfully submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

No. 85-1086

ROD WALLACE,

Plaintiff-Appellant,

v.

JOHN WYNNE HERRON, JOHN N. GULICK, JR., LAW OFFICES OF JOHN WYNNE HERRON, A Professional Corporation, and DARYL J. MCKINSTRY,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 83-C-197—**James E. Noland,** *Judge.*

ARGUED SEPTEMBER 24, 1985—DECIDED DECEMBER 5, 1985

Before BAUER and WOOD, *Circuit Judges,* and GRANT, *Senior District Judge.**

WOOD, *Circuit Judge.* Rod Wallace, the plaintiff-appellant, appeals the district court's decision to dismiss his suit against the defendants-appellees for lack of personal jurisdiction. The plaintiff, an Indiana resident, sued the defendants, three California attorneys and a California professional corporation, in Indiana for malicious prosecution.

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* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

Wallace's malicious-prosecution claim is based upon a prior lawsuit in California; in the prior suit the defendants represented a couple, Donna and Willis Seely, who sued a number of parties including Wallace. The district court concluded that it had no personal jurisdiction over the defendants and dismissed the case. We affirm.

I.

Rod Wallace, the plaintiff, is an Indiana resident who since the late 1960's has been an independent contractor for several companies dealing in log-home products. Donna and Willis Seely were residents of Indiana from 1974 to 1976, and during that time the Seelys discussed with Wallace their interest in obtaining a log-home franchise.

On April 26, 1975, the Seely's signed a franchise dealership agreement with Real Log Homes, Inc. ("Real"). The agreement gave the Seelys a territory covering several counties in northern California. Wallace was not a party to this agreement and played no role in the negotiations between Real and the Seelys. At no time was Wallace an agent or officer of Real.

In 1976 the Seelys moved to their territory in California to begin marketing log homes. Unfortunately all did not go well and the difficulties the Seelys encountered with Real led them to seek legal aid from the Law Offices of John Wynne Herron ("Herron Law Offices"), a professional corporation. Attorneys John N. Gulick, Jr. and John Wynne Herron, acting on behalf of the Seelys, filed a lawsuit in California state court on February 16, 1978. On March 1, 1978, an amended complaint was filed adding Wallace as a defendant. Eventually the Seelys terminated their attorney-client relationship with Herron Law Offices, and Herron withdrew as counsel of record on May 25, 1979. Attorney Daryl McKinstry, who had entered his appearance on behalf of the Seelys in January, 1979, assumed supervision of the case.

On April 23, 1983, the Seelys dismissed the case against Wallace. On March 27, 1984, Wallace brought this pres-

ent action in Indiana state court for malicious prosecution, and the defendants removed the case to the federal district court.[1] The defendants then filed motions to dismiss on the basis that the Indiana district court lacked personal jurisdiction over them. The district court concluded that it lacked personal jurisdiction over all the defendants and granted the defendants' motions, ordering the plaintiff's complaint dismissed on January 9, 1985.

II.

The only issue before this court is whether the district court had *in personam* jurisdiction over defendants Herron, Gulick, McKinstry, and Herron Law Offices. We look first to Indiana's "long-arm" statute, Ind. Code Ann., Title 34, Trial Rule 4.4 (West 1985). This rule extends personal jurisdiction of courts sitting in Indiana, including federal courts, to the limits permitted under the due process clause of the Fourteenth Amendment. *See First National Bank of Louisville v. Bezema*, 569 F. Supp. 818, 819 (S.D. Ind. 1983); *Oddi v. Mariner-Denver, Inc.*, 461 F. Supp. 306, 308 (S.D. Ind. 1978); *see also Nu-Way Systems of Indianapolis, Inc. v. Belmont Marketing, Inc.*, 635 F.2d 617, 619 (7th Cir. 1980). Our sole inquiry, therefore, is whether the district court could, consistent with due process, assert *in personam* jurisdiction over the defendants.

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[1] The Indiana state court, before removal to the federal court, had denied the defendant Donna Seely's motion to dismiss for want of personal jurisdiction. Defendant Donna Seely filed the motion both on her own behalf and as administratrix of her late husband Willis Seely's estate. After the Indiana trial court ruled on Seely's motion, the plaintiff added defendants Gulick, Herron, McKinstry, and Herron Law Offices, and the new defendants removed the case to federal court. Following removal, Seely filed a motion to reconsider her personal jurisdiction claim. Before the federal trial court could consider Seely's new motion, Wallace and Seely stipulated to a dismissal without prejudice of Wallace's claim against the Seelys. This appeal does not involve any issues with respect to the Seelys.

The Supreme Court first held that the due process clause of the Fourteenth Amendment limits the power of a State to assert *in personam* jurisdiction over a nonresident defendant in *Pennoyer v. Neff*, 95 U.S. 714 (1877). Generally, due process requirements demand that the defendant have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

A court may obtain *in personam* jurisdiction over a defendant based upon either the defendant's general contacts with the forum or the defendant's specific contacts. If a defendant has sufficient "continuous and systematic general . . . contacts" with the State, *see, e.g., Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), the State may exercise *in personam* jurisdiction over the defendant for a "cause of action [that] does not arise out of or relate to the [defendant's] activities in the forum State." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 104 S. Ct. 1868, 1872-73 (1984). The district court found, and the plaintiff does not contest, that the defendants' contacts with Indiana were insufficient to support general *in personam* jurisdiction.

The plaintiff contends, rather, that the Indiana courts may exercise specific *in personam* jurisdiction over the defendants because this controversy "is related to or 'arises out of' [the defendants'] contacts with the forum." *See Helicopteros Nacionales*, 104 S. Ct. at 1872 (citing *Schaffer v. Heitner*, 433 U.S. 186, 204 (1977)). We therefore must examine the relationship among the defendants, the forum state of Indiana, and the litigation, *see Shaffer*, 433 U.S. at 204, to see whether the defendants have sufficient contacts with the forum such that the maintenance of personal jurisdiction over the defendants comports with traditional notions of fair play and substantial justice. *International Shoe*, 326 U.S. at 316. The defendants' conduct and connection with Indiana must be such that they should reasonably anticipate being subject to the jurisdic-

tion of an Indiana court. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

We agree with the district court's determination that defendants Gulick, Herron, McKinstry, and Herron Law Offices lacked the necessary minimum contacts with Indiana. Only Gulick had any actual contact with Indiana, having come to Indiana on one occasion to take depositions. Gulick, who was at that time and still is a resident of California, has never conducted any other business in Indiana and has never been licensed to practice law in Indiana. The present controversy does not arise out of Gulick's sole contact with Indiana, and it would offend traditional notions of fair play and substantial justice for an Indiana court to exercise *in personam* jurisdiction over him in this case.

Defendants Herron, McKinstry, and Herron Law Offices have even less contact with Indiana. Neither Herron nor McKinstry has ever set foot in Indiana, conducted business in Indiana, or been licensed to practice law in Indiana. Herron Law Offices, a California professional corporation, has never been licensed to do business in Indiana. As the district court pointed out, the Supreme Court held in *International Shoe*, 326 U.S. at 319, that the due process clause "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations."

Plaintiff argues that the defendants' minimum contacts with Indiana are established because the defendants served interrogatories, requested the production of documents, and caused the plaintiff to respond to five complaints in Indiana where the plaintiff resides. The fact of the matter, however, is that the defendants filed these motions on behalf of their clients in a California court pursuant to a California lawsuit, and it would be unreasonable to require the defendants to appear in Indiana to defend this suit on the basis of such attenuated contacts.

On appeal, the plaintiff argues that the recent Supreme Court decision in *Calder v. Jones*, 104 S. Ct. 1482 (1984), is analogous to his case. In *Calder*, entertainer Shirley Jones, a California resident, sued two employees of the National Enquirer. The defendants, who wrote and edited an allegedly libelous article, were both Florida residents. The court held that California was the focal point both of the article and of the harm suffered, and thus the California court could exercise jurisdiction over the defendants because of the California "effects" of the defendants' Florida conduct. *Id.* at 1487. The court concluded that because the defendants allegedly committed an intentional tort, knowing it would have a potentially devastating impact upon the plaintiff, and knowing that the plaintiff would be primarily injured in the state in which she lived and worked and in which the magazine had its largest circulation, the defendants "must 'reasonably anticipate being haled in court there' to answer for the truth of the statements made in their article." *Id.*

The plaintiff's reliance on *Calder* is misplaced. We do not believe that the Supreme Court, in *Calder*, was saying that any plaintiff may hale any defendant into court in the plaintiff's home state, where the defendant has no contacts, merely by asserting that the defendant has committed an intentional tort against the plaintiff. As the Supreme Court explained in *Burger King Corp. v. Rudzewicz*, 105 S. Ct. 2174 (1985) (decided after *Calder*), "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State." *Id.* at 2183. Due process requires that it be foreseeable "that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.* (quoting *World-Wide Volkswagen*, 444 U.S. at 297).

If we were to accept the plaintiff's argument, it would significantly undercut our traditional due-process protection for out-of-state defendants. If, for example, an Indiana plaintiff sued a California defendant in an Indiana court alleging an intentional tort, the California defendant

would be required to come to Indiana and defend the suit to protect himself, no matter how groundless or frivolous the suit might be. If the California defendant did not come to Indiana, the Indiana plaintiff could obtain a default judgment and presumably the defendant could not collaterally attack the judgment and relitigate the merits because the plaintiff's allegation of an intentional tort would have settled the question of the Indiana court's jurisdiction over the California defendant.

The Supreme Court in *Calder* did not make the type of dramatic change in the due-process analysis of *in personam* jurisdiction advocated by the plaintiff. Rather, the so-called "effects" test is merely another way of assessing the defendant's relevant contacts with the forum State. The defendant must still "purposefully avail [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Burger King*, 105 S. Ct. at 2183 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)). The forum State cannot hale the defendant into court "solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." 105 S. Ct. at 2183. Jurisdiction is proper "where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Id.* at 2183-84 (emphasis in original).

The Supreme Court did not intend the *Calder* "effects" test to apply only to libel cases. However, the "effects" of the intentional tort of libel in the forum state (*i.e.*, the plaintiff's residence) are perhaps more pronounced than the "effects" of most other intentional torts. Nevertheless, the key to *Calder* is that the effects of an alleged intentional tort are to be assessed as part of the analysis of the defendant's relevant contacts with the forum. Whether these effects, either alone or in combination with other contacts, are sufficient to support *in personam* jurisdiction will turn upon the particular facts of each case.

The defendants' contacts with Indiana in this case are significantly more attenuated than the *Calder* defendants' contacts with California. In *Calder*, the suit grew out of

an article about the California activities of a California resident whose career was centered in California. The defendants relied primarily on California sources in writing the article. 104 S. Ct. at 1486-87. California was the focal point both of the story and any harm suffered. The harm was uniquely related to California because the emotional distress and injury to professional reputation suffered by the plaintiff were primarily a result of the publication of the story to other California residents. *Id.* *Calder* on its facts is sharply distinguishable from this malicious prosecution case, where the defendants' only arguable contacts with Indiana were the legal papers which were served on Wallace in Indiana. The defendants filed these papers on behalf of their California clients in a California court pursuant to a California lawsuit. Unlike the *Calder* defendants, Gulick, Herron, McKinstry, and Herron Law Offices took no action that created the necessary connection with Indiana for them to reasonably anticipate being haled into court there. Their contacts with Indiana are so attenuated that it would violate the due process clause of the Fourteenth Amendment for an Indiana court to exercise *in personam* jurisdiction over them.

III.

The Indiana district court correctly concluded that the due process clause of the Fourteenth Amendment to the United States Constitution prevented the court from exercising *in personam* jurisdiction over these California defendants. The court's decision to dismiss the plaintiff Wallace's cause of action against defendants Gulick, Herron, McKinstry, and Herron Law Offices for lack of *in personam* jurisdiction is AFFIRMED.

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Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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JUDGMENT -- ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 5, 1985.

Before
Hon. William J. Bauer, Circuit Judge

Hon. Harlington Wood, Jr., Circuit

Judge Hon. Robert A. Grant,
Senior District Judge*

ROD WALLACE, Plaintiff-Appellant No. 85-1086 vs.	) Appeal from the United States District Court for the Southern District of Indiana,
JOHN WYNNE HERRON, JOHN N. GULICK, JR. LAW OFFICES OF JOHN WYNNE HERRON, A Professional Corporation and DARYL J. McKINSTRY, Defendant-Appellees.	) No. 83-C-731 James E. Noland, Judge

This cause was heard on the record from the United States District Court for the Southern District of Indiana,

---

* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

Indianapolis Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ROD WALLACE, Plaintiff, v. DONNA SEELY, Individually and as Administratrix of the Estate of Willis Seely, Deceased, JOHN WYNNE HERRON, JOHN N. GULICK, JR., LAW OFFICES OF JOHN WYNNE HERRON, A Professional Corporation, and DARYL J. McKINSTRY, Defendants.	)))))Cause No.)IP 84-731-C)))))))))

ORDER

This matter is before this Court upon motions to filed by defendants John Wynne Herron, John N. Gulick, Jr., Law Offices of John Wynne Herron, and Daryl J. McKinstry, pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure.

Whereupon the Court, having considered said motions and the memo-

randa filed in support thereof and in opposition thereto, and being duly advised in the premises, now finds that the Court lacks personal jurisdiction over all defendants, and hereby GRANTS defendants' motions. Therefore, plaintiff's complaint is DISMISSED against these defendants.

IT IS SO ORDERED.

DATED this 9th day of January, 1985.

James E. Noland
JAMES E. NOLAND, U.S.
District Judge

MEMORANDUM ENTRY

Plaintiff Rod Wallace had for many years been an independent contractor for companies that dealt in log homes. In 1975, Willis and Donna Seely discussed with Wallace the possibility of obtaining a franchise similar to Wallace's.

These discussions occurred in Brown County, where the Seeleys and Wallace resided.

On April 26, 1975, the Seelys signed a franchise agreement with Real Log Homes, Inc. ("Real Log"). This agreement gave the Seelys a franchise covering several counties in northern California. Wallace was not a party to this agreement and did not participate in any negotiations between Real Log and the Seeleys. Wallace was not an officer nor an agent of Real Log.

In 1976, the Seelys moved to California to market log homes in their franchise territory. The Seeleys subsequently encountered difficulties in their association with Real Log and filed suit in a California state court on February 26, 1978. Wallace was added as a defendant in an amended compliant

filed on March 1, 1978. The attorneys for the Seelys in this case were defendants John N. Gulick and John Wynne Herron, of the Law Offices of John Wynne Herron. Gulick and Herron eventually withdrew from the case, and defendant Daryl J. McKinstry entered his appearance.

On April 23, 1983, the Seelys dismissed the case against Wallace. Wallace then sued in state court in Indiana for malicious prosecution, and the case was removed to this Court.

Defendants Herron, Gulick, and Law Offices of John Wynne Herron ("Law Offices") filed a motion to dismiss, as did defendant McKinstry. The basis of the motions is that this Court lacks personal jurisdiction over defendants. Defendant Donna Seely, individually and as administratrix of Willis Seely's

estate, originally filed a motion for reconsideration of a motion to dismiss filed in state court prior to removal. However, plaintiff and Seely stipulated to dismissal without prejudice. Therefore, the only issue now before the Court is whether there is in personam jurisdiction over defendants Herron, Gulick, Law Offices, and McKinstry.

Under Rule 4(e) of the Federal Rules of Civil Procedure, this Court looks to Indiana's "long-arm" statute, Trial Rule 4.4, to determine whether there is personal jurisdiction. It has been held that Trial Rule 4.4 extends personal jurisdiction to the limits permitted under the Due Process Clause of the Fourteenth Amendment. Oddi v. Mariner-Denver, Inc., 461 F. Supp. 306 (S.D. Ind. 1978). See also Nu-Way Systems of Indianapolis, Inc. v. Belmont

Mktg. Inc., 635 F.2d 617 (7th Cir. 1980). The appropriate question in this case, therefore, is whether it is consistent with the Due Process Clause to assert in personam jurisdiction over these defendants. This Court holds it is not.

The Due Process Clause limits the power of a state to assert in personam jurisdiction over a nonresident defendant. Helicopteros Nacionales de Columbia, S.A. v. Hall, ____ U.S. ____, 104 S.Ct. 1868 (1984). Jurisdiction over a nonresident defendant exists only when the defendant has "minimum contacts" with the forum state. International Shoe Co. v. Washington, 326 U.S. 310 (1945). These minimum contacts must be such that the maintenance of the suit does not offend the traditional notions of fair play and substantial

justice. International Shoe; Milliken v. Meyer, 311 U.S. 457 (1940).

The Supreme Court in Helicopteros Nacionales recognized that in personam jurisdiction has two forms: "specific jurisdiction," which occurs when a controversy arises out of or is related to a defendant's contacts with the forum; and "general jurisdiction," which occurs when the controversy does not arise out of or relate to contacts with the forum state but where the defendant nevertheless has sufficient contacts with the state. For there to be general jurisdiction there must be continuous and systematic contact between the defendant and the forum state. Perkins v. Benquet Cons. Mining Co., 342 U.S. 437 (1952). Cf. Helicopteros Nacionales de Columbia, S.A. v. Hall, 104 S.Ct. 1868 (single visit by corporate agent to

forum state not sufficient to confer general jurisdiction).

Defendants Gulick, Herron, McKinstry and Law Offices were all involved with representing the Seelys in the California lawsuit. Of these defendants, only Gulick had actual contact with this forum. This contact, however, was not sufficient to support jurisdiction in the present suit. In the course of representing the Seelys, Gulick came to Indiana on one occasion to take depositions. Except for this visit Gulick had never been to Indiana, had never conducted business here, and was not licensed to practice here. He was and still is a resident of California. Gulick's actions, therefore, do not satisfy the minimum contacts requirement. The present controversy does not arise out of or relate to

Gulick's contact with Indiana. Nor have Gulick's contacts with this forum been continuous and systematic. The one visit thus is not sufficient to confer either general or specific jurisdiction, and to assert in personam jurisdiction over defendant Gulick would offend traditional notions of fair play and substantial justice.

The notions of fair play and substantial justice would be even more offended if this Court were to assert in personam jurisdiction over defendants Herron, McKinstry, and Law Offices. Herron and McKinstry have never been in Indiana, nor have they conducted business here. Law Offices was a California corporation and was not licensed to do business in Indiana. The Due Process Clause "does not contemplate that a state may make binding a judgment

in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations." International Shoe Co. v. Washington, 326 U.S. at 319.

Plaintiff also argues that because these defendants served interrogatories and requested the production of documents, and because they caused plaintiff to respond to five amended complaints, there are sufficient minimum contacts. This Court finds, however, that these "contacts" are too attenuated to justify asserting in personam jurisdiction, and it would not be reasonable to require these defendants to appear in this jurisdiction solely on the basis that motions filed in California on behalf of their clients were served on an Indiana resident.

The Court therefore finds that this case should be dismissed against defendants Gulick, Herron, McKinstry and Law Offices of John Wynne Herron. Accordingly, defendants' motions to dismiss are GRANTED.

AMENDMENT XIV TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA

Section 1. [Due Process of Law] [N]or shall any State deprive any person of life, liberty, or property without due process of law . . . .

INDIANA CODE, TITLE 34

Trial Rule 4.4 - Service Upon Persons In Actions For Acts Done In This State Or Having An Effect In This State

(A) Acts serving as a basis for jurisdiction. Any person or organization that is a nonresident of this state, a resident of this state who has left the state, or a person whose residence is unknown, submits to the jurisdiction of the courts as to any action arising from the following acts committed by him or his agent:

(1) Doing any business in this state;

(2) Causing personal injury or property damage by an act or omission done within this state.

(3) Causing personal injury or property damage in this state by an occurrence, act or omission done outside this state if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue or benefit from goods, materials, or services used, consumed, or rendered in this state;

. . .

No. 85-1462

Supreme Court, U.S.
FILED
MAR 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

ROD WALLACE,

Petitioner,

against

JOHN WYNNE HERRON,
JOHN N. GULICK, JR.
LAW OFFICES OF JOHN WYNNE HERRON,
A Professional Corporation,
and DARYL J. MCKINSTRY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS HERRON, GULICK AND LAW OFFICES

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8 pp

QUESTION PRESENTED

Did the District Court properly dismiss this malicious prosecution action for lack of *in personam* jurisdiction over the nonresident defendants-lawyers where their only contacts with Indiana were that, during the course of a California lawsuit, one of them came to Indiana to take two depositions, they obtained service of process on an Indiana resident-defendant through the Brown County, Indiana Sheriff, and they filed several discovery requests in the California court requiring some response in Indiana?

PARTIES

All parties are identified in the caption.[1]

[1] Respondent Law Offices of John Wynne Herron, A Professional Corporation, was a professional corporation organized under the laws of the State of California. It is now referred to as Herron & Herron, A Professional Corporation. It has no parent companies, subsidiaries or affiliates. Supreme Court Rule 28.1.

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STATEMENT OF THE CASE

For all times pertinent herein, Respondent John Wynne Herron (Herron) resided and practiced law in San Francisco, California. His law firm, Respondent Law Offices of John Wynne Herron, A Professional Corporation (Law Offices), was incorporated under the laws of the State of California. From December 1975 until December 1978, Law Offices employed Respondent John N. Gulick, Jr. (Gulick) as an attorney. (Hereafter Herron, Gulick and Law Offices are collectively referred to as "Respondents".)

In December 1977, Donna Seely and her late husband, Willis Seely, retained Respondents to bring legal action against various persons and entities, including Petitioner, Rod Wallace. That legal action arose out of the purchase by the Seelys of a log cabin and of a franchise to sell similar log cabins in California.

After interviewing the Seelys, conducting preliminary legal research and other investigation, Respondents determined that a cause of action existed against the various defendants, including Petitioner Wallace. Consequently, in February 1978, on the Seelys' behalf, Respondents filed a complaint in El Dorado County, California, against various defendants. Petitioner Wallace was added by amended complaint, filed March 1, 1978, although he was named in the body of the original complaint.

The California trial court denied Wallace's motion to dismiss in May 1978, and required him to file responsive pleadings. The trial court also denied similar motions made by the various other defendants. Those defendants sought an interlocutory appeal of that ruling. While the appeal was pending, Gulick left the employ of Law Offices and had nothing further to do with the *Seely-Wallace* matter. Respondent Herron handled the appeal for the Seelys. The trial court's rulings were affirmed in May 1979.

At the Seelys' request, Respondents Herron and Law Offices withdrew their appearance on May 25, 1979. Respondent McKinstry then assumed supervision of the case. Subsequently, the Seelys, by Respondent McKinstry, agreed to dismiss the case against Petitioner Wallace on April 23, 1983.

On March 27, 1984, Petitioner filed an amended complaint for malicious prosecution against the Seelys and Respondents. Respondents removed the case to the United States District Court for the Southern District of Indiana, Indianapolis Division, pursuant to 28 U.S.C. §1441. (The Seelys are no longer parties to this litigation pursuant to a stipulation of dismissal without prejudice and an order of dismissal entered January 8, 1985, by the District Court.)

Respondents filed a motion to dismiss for lack of personal jurisdiction, as did Respondent McKinstry. On January 9, 1985, the District Court, James E. Noland, J., entered an order dismissing Petitioner's complaint against all of the Respondents. The United States Court of Appeals for the Seventh Circuit affirmed. *Wallace v. Herron*, 778 F.2d 391 (7th Cir. 1985). Petitioner now seeks a writ of certiorari pursuant to 28 U.S.C. §2101(c).

REASONS FOR DENYING THE WRIT

The petition does not present any reason so important or special to warrant issuance of a writ. The decision of the Court of Appeals rendered below does not conflict with any decision of this Court or of any other federal court. Indeed, the decisions below correctly, accurately and fairly applied familiar, established legal principles recently reaffirmed by this Court to the facts of this case. No reason therefore exists for this Court to exercise its extraordinary discretion and issue a writ.

Petitioner claims the ruling of the Court of Appeals is contrary to this Court's prior decisions in *Burger King Corporation v. Rudzewicz*, ___ U.S. ___, 105 S.Ct. ___, 85 L.Ed. 2d 528 (1985) and *Calder v. Jones*, ___ U.S. ___, 104

S.Ct. 1482, 79 L.Ed. 2d 804 (1984). Petitioner also claims the decision of the Court of Appeals conflicts with decisions of the other federal circuit courts of appeal, citing six specific cases. Neither of Petitioner's claims is true.

First, the decision of the Court of Appeals is not in conflict with *Burger King*. Although Petitioner makes this claim, he does not demonstrate any conflict. Indeed, there is none, because the cases are clearly distinguishable on their facts. *Burger King* involved a breach of contract and not alleged tortious out-of-state conduct. In any event, the Court of Appeals cited *Burger King* with approval and correctly and conscientiously applied its teachings.

The ruling of the Court of Appeals also is not in conflict with *Calder*. (Petitioner failed to raise *Calder* in the trial court.) As the Court of Appeals recognized, 778 F.2d at 395, *Calder*, by its own terms, did not change the bottom line due process analysis for personal jurisdiction: the defendant must still have "certain minimum contacts...such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Calder*, 79 L.Ed. 2d at 811, quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). This Court in *Calder* cited the familiar minimum contacts cases without comment or criticism. See also *Burger King*, 85 L.Ed. 2d at 542; *Keeton v. Hustler Magazine, Inc.*, ___ U.S. ___, 104 S.Ct. 1473, 79 L.Ed. 2d 790, 797 (1984). The Court of Appeals in this case cited these familiar concepts, as reiterated in *Burger King*, *Calder* and *Keeton*, and then accurately and correctly applied them to the facts of the case before it.

Indeed, the Court of Appeals decision is wholly consistent and fully in accord with the prior decisions of this Court. See, e.g., *Helicopteros Nacionales de Columbia, S.A. v. Hall*, ___ U.S. ___, 104 S.Ct. 1868, 80 L.Ed 2d 404 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 285 (1980); *Rush v. Savchuk*, 444 U.S. 320 (1980); *Shaffer v. Heitner*, 433 U.S. 186 (1977). Petitioner's reliance solely on

Calder implies recognition that the Court of Appeals correctly, accurately, and fairly applied the pre-*Calder* cases of this Court.

Furthermore, the opinion of the Court of Appeals does not conflict with that of any other federal circuit. In each of Petitioner's six cited cases, the court simply cited *Calder* for the familiar tests and applied them to the facts before it. These cases merely illustrate the application of accepted legal principles to the individual facts of each case.

In addition, the cited cases are distinguishable on their facts. None involved malicious prosecution. Three of the six did not even involve an alleged intentional tort so they do not even support Petitioner's alternative phrasing of the question presented. The defendants in all six cases also had demonstrably more significant contacts than Respondents had here. Thus, their facts are not so analogous as to control the disposition of this case. There is simply no split in the circuits requiring clarification by this Court.

The District Court and the Court of Appeals gave full consideration to the issues raised by Petitioner and ruled in favor of Respondents. The result was fair, because due process has always required some modicum of contact with the forum state. *Burger King*; *Calder*. Petitioner presents a question to this Court that involves only the application of familiar legal rules to the facts of this case. Personal jurisdiction cases inherently involve fact intensive inquiries. *Hanson v. Denckla*, 357 U.S. 235 (1958). Certiorari should not be granted merely to review the facts of this case. E.g., *Tacon v. Arizona*, 410 U.S. 351 (1973). The question presented was resolved fairly and correctly in favor of Respondents twice in the proceedings below. The question is not one as to which certiorari should be granted.

Any other result would create confusion and chaos in the established law of personal jurisdiction by undermining all the previous jurisdictional analyses including *Calder* and *Burger King*. As the Court of Appeals pointed out, the practical effect of adopting Petitioner's extreme viewpoint

would be to eliminate all due process protection for foreign defendants upon the mere allegation of an intentional tort. *Calder* did not suggest such a result.

CONCLUSION

The petition demonstrates nothing that would warrant reexamination of the familiar and settled principles of personal jurisdiction. Given that this Court has recently spoken in *Burger King*, *Calder* and *Keeton*, and the courts below followed those cases, the present petition simply does not present any special or important issue such that this Court should grant certiorari review. The petition should therefore be denied.

Respectfully submitted,

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No. 85-1462 (3)

Supreme Court, U.S.
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IN THE

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT McKINSTRY'S BRIEF IN OPPOSITION

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IN THE

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT McKINSTRY'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case was a malicious prosecution action filed by the petitioner, Rod Wallace ("Wallace"), against the respondents, arising from a lawsuit filed by Donna and Willis Seely ("Seelys") against Wallace and several other defendants.

Wallace, an Indiana resident, is an independent contractor for several companies dealing in log-home products. In 1975, the Seelys discussed with Wallace the possibility of obtaining a log home franchise. On April 26, 1975, the Seelys entered into a dealership franchise agreement with Real Log Homes, Inc., giving the Seelys a franchise in northern California. The Seelys moved to California and began working with the Real Log Homes, Inc. franchise.

The Seelys subsequently encountered difficulties in their association with Real Log Homes, Inc., and consulted respondent law offices of John Wynne Herron ("Law Office"). Respondents John Wynne Herron ("Herron") and John N. Gulick, Jr. ("Gulick") filed a lawsuit on behalf of the Seelys in California state court on February 16, 1978 against Real Log Homes, Inc., a Montana corporation, Traditional Living, Inc., a Vermont Corporation, and several individual defendants. The Seelys filed an amended complaint in California on March 1, 1978, adding Wallace as a defendant. Gulick and Herron eventually withdrew from the case and respondent Daryl J. McKinstry entered his appearance in January, 1979. On April 23, 1983, the Seelys dismissed the California suit against Wallace.

The Seelys' suit was filed in a California court involving injuries, damages and causes of actions arising solely in California. Respondent McKinstry has never met Wallace, nor has he ever been in Indiana for the purposes of pursuing a claim against him or for any other reason. Respondents Gulick and Herron are California residents and only Gulick has been in the State of Indiana, coming to Indiana on one occasion for a discovery deposition. The respondents did serve the initial complaint from the California suit on the petitioner at his residence in Indiana; subsequent pleadings were served upon his California counsel.

On March 27, 1984, Wallace brought the present action against the Seelys in the Circuit Court of Brown County, Indiana for malicious prosecution. After the state court

denied the Seelys' motion to dismiss for want of personal jurisdiction, the petitioner added the respondents as defendants and the new defendants removed the case to the United States District Court for the Southern District of Indiana. After the case was removed to federal court, Wallace and the Seelys stipulated to a dismissal of the claim against the Seelys. On January 9, 1985, the Honorable James E. Noland of the United States District Court found that his court lacked personal jurisdiction over the respondents and ordered the complaint dismissed pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure. See Appendix pp. A-11 et seq., Petition for Writ of Certiorari. On appeal to the United States Court of Appeals for the Seventh Circuit, the decision of the District Court was affirmed. See Appendix pp. A-1 et seq., Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

Due process requires the existence of sufficient minimum contacts among the defendant, the forum and the litigation so that the exercise of personal jurisdiction over the defendant is fair and just. The respondents do not have the requisite minimum contacts with the forum state of Indiana to justify the exercise by Indiana of its personal jurisdiction. The Courts below weighed the facts of the case and correctly determined that sufficient minimum contacts did not exist. A reweighing of the facts does not present a special and important reason for review.

The decision of the Seventh Circuit Court of Appeals is not in conflict with this Court's decisions in *Calder v. Jones*, 104 S.Ct. 1482 (1984) and *Burger King Corp. v. Rudzewicz*, 105 S.Ct. 2174 (1985). Both cases are factually distinguishable from the present case. *Calder* involved a libel action where the focus of the nonresident defendants' actions was clearly the forum state. The "effects" of their actions on the forum state merely added an additional contact as measured by traditional standards. *Rudzewicz*

involved a contract where the defendant entered into a continuing and extensive relationship with the plaintiff in the forum state. None of these factors exist here. The focus of the respondents' actions was not the forum state, nor did the defendants contract for a continuing and extensive relationship with the petitioner in the forum state.

The present case is also distinguishable from decisions of other Federal Circuit Courts of Appeal which the petitioner contends are in conflict with this decision. Each of those other cases contain facts which evidence strong contacts with the forum state which do not exist here.

For the foregoing reasons, the respondent, Daryl J. McKinstry, submits that there is no special and important reason for the decision of the Seventh Circuit Court of Appeals to be reviewed.

ARGUMENT

A writ of certiorari should be granted only where there are special and important reasons therefor. Supreme Court Rule 17.1; *Fay v. Noia*, 372 U.S. 391, 436 (1963). Special and important reasons do not include issues of merely academic interest or solely in the interest of particular litigants. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955). There are no special or important reasons for granting a writ of certiorari in this case. Therefore, the respondent requests that the writ be denied.

The petitioner is seeking review of a decision by the United States Court of Appeals for the Seventh Circuit which affirmed the dismissal of a suit by the United States District Court for the Southern District of Indiana for lack of personal jurisdiction. However, the courts below were correct in deciding that, under the facts of this case, the defendants did not have sufficient minimum contacts with Indiana to justify the exercise by a court in Indiana of personal jurisdiction over the defendants.

The due process clause of the Fourteenth Amendment limits the power of a state to assert personal jurisdiction over nonresident defendants by requiring that the defendant have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'". *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Where the dispute arises from or is related to the defendants' contacts with the forum, the sufficiency of these contacts must be determined by focusing on "the relationship among the defendant, the forum, and the litigation." *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 104 S.Ct. 1868, 1872 (1984); *Keeton v. Hustler Magazine, Inc.*, 104 S.Ct. 1473, 1478 (1984). The defendant's contacts with the forum state must be such that the defendant could reasonably anticipate being haled into court in the forum state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

The defendants below lacked the necessary minimum contacts with Indiana. The respondents are licensed to practice law in California, not Indiana, and have never been licensed in Indiana. None of the respondents has ever conducted or solicited business within the state of Indiana. Only respondent Gulick had any actual contact with Indiana — one trip to the state to take depositions.

The "minimum contacts" test cannot be applied mechanically; rather, it requires that the facts in each case be weighed to determine whether the necessary minimum contacts exist to justify the exercise of personal jurisdiction. *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978). The courts below weighed the facts and correctly concluded that under these facts the due process clause of the Fourteenth Amendment prevented the exercise of personal jurisdiction in Indiana over these California respondents. Inasmuch as the petition requests that the Court reweigh the facts of this case, it raises an issue for

which there are no special or important reasons for review. Supreme Court Rule 17.1.

A. The decision below is not in conflict with applicable decisions of this Court.

The decisions below are not in conflict with the Court's decision in *Calder v. Jones*, 104 S.Ct. 1482 (1984). *Calder v. Jones* is not applicable to the facts of this case. In *Calder*, the defendants' contacts with the forum state were much stronger than in this case. The *Calder* defendants wrote and edited an allegedly libelous newspaper article concerning the California activities of a California resident whose damaged career was centered in California, the forum state. The article was drawn from California sources and was published in a newspaper which had a circulation of over 600,000 copies in California, the state with the highest circulation of that newspaper. Thus the focus of the defendants' actions was clearly the forum state of California. *Calder*, 104 S.Ct. at 1486-87.

Unlike the defendants in *Calder*, the focus here of the respondents' actions was not the forum state of Indiana. The respondents filed and maintained a California lawsuit on behalf of California clients in a California court. Thus, the focus of the respondents' actions was California, not Indiana.

Furthermore, *Calder* involved a libel action. An essential element of a cause of action for libel or defamation is publication to a third party. Restatement (Second) of Torts §558(b) (1977). The importance of this distinction is highlighted by the companion case to *Calder*, *Keeton v. Hustler Magazine, Inc.*, 104 S.Ct. 1473 (1984): "The tort of libel is generally held to occur wherever the offending material is circulated. Restatement (Second) of Torts §577A, Comment a." *Keeton*, 104 S.Ct. at 1479. In addition, libel harms not only the subject of the libel but also the readers of the libel. *Id.* Therefore, because *Calder* involved a libel action, California had a greater interest in the

litigation than it would have had if it were merely an isolated case of an injury to one of its citizens. Because of the publication in California, the tort occurred in California and California citizens generally were harmed when exposed to the libel.

Malicious prosecution does not have an element analogous to publication. *See* Restatement (Second) of Torts §674 (1977). It cannot be argued that the citizens of Indiana in general were harmed by the alleged malicious prosecution by the defendants. The State of Indiana does not have the same contact with or interest in this litigation as the State of California in *Calder*.

The only similarity between *Calder* and the present case is that in both cases the alleged victim of the defendants' actions was a resident of the forum state. However, this single factor alone is not sufficient to justify the exercise of personal jurisdiction over a nonresident defendant. Nothing in *Calder* removed the requirement that the defendant purposefully establish "minimum contacts" in the forum state. See *Burger King Corp. v. Rudzewicz*, 105 S.Ct. 2174, 2183 (1985); *Helicopteros Nacionales*, 104 S.Ct. at 1872. Rather, *Calder* merely recognizes that the effect of the defendant's conduct purposefully directed at the forum state may constitute an additional contact. In *Calder*, there were sufficient contacts between the defendants and the forum state such that the focal point of their activity was the forum state. 104 S.Ct. at 1486-87. These contacts do not exist here. The defendants' actions in naming an Indiana resident as one of several foreign defendants in a California suit had no pervasive impact upon other Indiana citizens.

The decisions below also do not conflict with this Court's most recent decision on the matter of personal jurisdiction in *Burger King Corp. v. Rudzewicz*, 105 S.Ct. 2174 (1985). As in *Calder*, the defendant in *Rudzewicz* had contacts which do not exist under the facts of the case at bar. The dispute in *Rudzewicz* arose out of a written contract which had substantial connections with the forum state. 105 S.Ct.

at 2186. The defendant "entered into a carefully structured 20-year relationship that envisioned continuing and wide-reaching contacts with" the plaintiff corporation in the forum state. *Id.* Those facts do not exist in the present case. To the extent that *Rudzewicz* reaffirms principles of general applicability, the decision of the Court of Appeals below follows *Rudzewicz*. *See* Appendix, p. A-6, Petition for Writ of Certiorari. The decision below is not in conflict with the Court's decision in *Rudzewicz*.

B. **The decision below is not in conflict with other Federal Courts of Appeals.**

The petitioner cites six cases from other Federal Courts of Appeals to be in conflict with the decision below. However, a reading of those cases reveals that each has facts which support the exercise of personal jurisdiction that this case does not have. *Burt v. Board of Regents of University of Nebraska*, 757 F.2d 242 (10th Cir. 1985), was a defamation case whose nonresident defendants published their libel by sending a letter to a third party resident of the forum state. *Blue Ridge Bank v. Veribanc, Inc.*, 755 F.2d 371 (4th Cir. 1985) was a defamation case where publication occurred in a newspaper of the forum state. *Army Times Publishing Co. v. Watts*, 730 F.2d 1398 (11th Cir. 1984), was another defamation case where the forum state was a "significant market" of the defendant. *Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162 (5th Cir. 1985), was a products liability case where allegedly defective replacement parts were shipped into forum state. *Cubbage v. Merchent*, 744 F.2d 665 (9th Cir. 1984) was a medical malpractice case in which defendants engaged in continuous efforts to provide services in the forum state, including arranging for reimbursement from the forum state for services rendered to the forum's residents. *Donovan v. Grim Hotel Co.*, 747 F.2d 966 (5th Cir. 1984), involved personal liability under the Fair Labor Standards Act where a corporate officer defendant ran hotels and

hired managers in the forum state. The respondents here do not have such contacts with the forum state. The decision below is not in conflict with the decisions of other circuits.

CONCLUSION

There are no special or important reasons to grant the writ of certiorari. The case below is not in conflict with any applicable decisions of this Court or of any Federal Court of Appeal. The decisions below were correct. The respondents did not have sufficient minimum contacts to justify the exercise of personal justification over them by the State of Indiana. A further review of the decisions below may only occur by an impermissible reweighing of the facts already considered. The respondents respectfully request that the petition for certiorari be denied.

Respectfully submitted,

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